

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

8 ARTHUR THOMPSON,
9 Plaintiff,
10 v.
11 JO ANNE B. BARNHART,
Commissioner of Social
Security,
13 Defendant.
14)
) No. CV-05-3081-CI
)
) ORDER GRANTING IN PART
) PLAINTIFF'S MOTION FOR SUMMARY
) JUDGMENT AND REMANDING FOR
) ADDITIONAL PROCEEDINGS
) PURSUANT TO SENTENCE FOUR OF
) 42 U.S.C. § 405(g)
)
)
)

15 BEFORE THE COURT are cross-Motions for Summary Judgment (Ct.
16 Rec. 16, 20), submitted for disposition without oral argument on May
17 15, 2006. Attorney D. James Tree represents Plaintiff; Special
18 Assistant United States Attorney Jeffrey H. Baird represents
19 Defendant. The parties have consented to proceed before a
20 magistrate judge. (Ct. Rec. 3.) After reviewing the administrative
21 record and the briefs filed by the parties, the court **GRANTS IN PART**
22 Plaintiff's Motion for Summary Judgment and **REMANDS** for additional
23 proceedings pursuant to sentence four of 42 U.S.C. § 405(q).

24 Plaintiff, 40-years-old at the time of the second
25 administrative decision, earned a GED and had past work experience
26 as a service manager, RV sales associate and mechanic, tune-up
27 mechanic, plumber apprentice, boat manufacturing worker, welder and

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1 cook. He was a single parent with sole custody of sons, ages 10 and
2 11. (Tr. at 131.) He filed applications for Social Security
3 disability and Supplemental Security Income benefits on January 25,
4 1999, alleging disability as of October 5, 1996. (Tr. at 104.)
5 Following a denial of benefits at the initial stage and on
6 reconsideration, a hearing was held before Administrative Law Judge
7 Arnold Battise (ALJ). On December 14, 2000, the ALJ denied
8 benefits; the cause was remanded by the Appeals Council on February
9 23, 2003. A supplemental administrative hearing was held and
10 Plaintiff amended his application to a closed period of disability
11 from October 5, 1996, to April 1, 2001. (Tr. at 21.) ALJ Verrell
12 Dethloff denied benefits on December 16, 2004. Review was denied by
13 the Appeals Council. This appeal followed. Jurisdiction is
14 appropriate pursuant to 42 U.S.C. § 405(g).

15 **ADMINISTRATIVE DECISION**

16 The ALJ concluded Plaintiff met the non-disability requirements
17 and was insured for benefits through December 31, 2000. (Tr. at
18 31.) Plaintiff had not engaged in substantial gainful activity
19 during the alleged closed period of disability: October 5, 1996, to
20 April 1, 2001. Plaintiff suffered from severe impairments including
21 cannabis dependence, adjustment disorder with a depressed mood, and
22 mild peripheral neuropathy secondary to chemotherapy, but those
23 impairments were not found to meet the Listings. The ALJ also
24 concluded Plaintiff's testimony was not fully credible. The ALJ
25 determined Plaintiff had the residual capacity for medium work with
26 additional fine manipulative limitations and restriction to simple
27 tasks. (Tr. at 31.) The ALJ concluded Plaintiff could return to
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1 his past relevant work as a boat manufacturing worker and,
 2 therefore, was not disabled. Alternatively, the ALJ found Plaintiff
 3 could perform other work which exists in significant numbers in the
 4 national economy. Therefore, the ALJ found Plaintiff was not
 5 disabled.

6 ISSUES

7 The question presented is whether there was substantial
 8 evidence to support the ALJ's decision denying benefits and, if so,
 9 whether that decision was based on proper legal standards.
 10 Plaintiff contends the ALJ erred when he erroneously (1) rejected
 11 the opinions of the treating, examining and reviewing physicians,
 12 and (2) failed to give proper consideration to the testimony of the
 13 vocational expert. Finding the first issue to be dispositive, the
 14 court does not address the second.

15 STANDARD OF REVIEW

16 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 17 court set out the standard of review:

18 The decision of the Commissioner may be reversed only if
 19 it is not supported by substantial evidence or if it is
 20 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
 1097 (9th Cir. 1999). Substantial evidence is defined as
 21 being more than a mere scintilla, but less than a
 22 preponderance. *Id.* at 1098. Put another way, substantial
 23 evidence is such relevant evidence as a reasonable mind
 24 might accept as adequate to support a conclusion.
Richardson v. Perales, 402 U.S. 389, 401 (1971). If the
 25 evidence is susceptible to more than one rational
 26 interpretation, the court may not substitute its judgment
 27 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
Morgan v. Comm'r of Soc. Sec. Admin. 169 F.3d 595, 599
 (9th Cir. 1999).

28 The ALJ is responsible for determining credibility,
 29 resolving conflicts in medical testimony, and resolving
 30 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 31 Cir. 1995). The ALJ's determinations of law are reviewed
 32 *de novo*, although deference is owed to a reasonable
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1 construction of the applicable statutes. *McNatt v. Apfel*,
 2 201 F.3d 1084, 1087 (9th Cir. 2000).

3 **SEQUENTIAL PROCESS**

4 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 5 requirements necessary to establish disability:

6 Under the Social Security Act, individuals who are
 7 "under a disability" are eligible to receive benefits. 42
 8 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 9 medically determinable physical or mental impairment"
 10 which prevents one from engaging "in any substantial
 11 gainful activity" and is expected to result in death or
 12 last "for a continuous period of not less than 12 months."
 13 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 14 from "anatomical, physiological, or psychological
 15 abnormalities which are demonstrable by medically
 acceptable clinical and laboratory diagnostic techniques."
 16 42 U.S.C. § 423(d)(3). The Act also provides that a
 17 claimant will be eligible for benefits only if his
 18 impairments "are of such severity that he is not only
 19 unable to do his previous work but cannot, considering his
 20 age, education and work experience, engage in any other
 21 kind of substantial gainful work which exists in the
 22 national economy . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

23 In evaluating whether a claimant suffers from a
 24 disability, an ALJ must apply a five-step sequential
 25 inquiry addressing both components of the definition,
 until a question is answered affirmatively or negatively
 26 in such a way that an ultimate determination can be made.
 27 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 28 claimant bears the burden of proving that [s]he is
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 1999). This requires the presentation of "complete and
 detailed objective medical reports of h[is] condition from
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 404.1512(a)-(b), 404.1513(d)).

23 **ANALYSIS**

24 Plaintiff asserts the ALJ erred when he failed to include as
 25 severe impairments Plaintiff's musculoskeletal condition and
 26 peripheral neuropathy, which resulted in limitations in both fine
 27 and gross manipulation. Additionally, Drs. Kester and Brown

1 determined Plaintiff would often experience deficiencies of
2 concentration, persistence or pace. (Tr. at 260.) Defendant
3 responds the ALJ correctly rejected examination findings of Dr.
4 Choudhry and relied on the opinion of the state agency physicians,
5 who concluded Plaintiff did not have postural or manipulative
6 limitations and could perform medium work. Additionally, Defendant
7 responds Dr. Kester's finding was not an RFC assessment and the ALJ
8 correctly found Plaintiff could perform simple, one to three step
9 tasks.

10 The ALJ, in his opinion, concluded Plaintiff would be able to
11 perform one to three step tasks. (Tr. at 26.) Drs. Kester and
12 Brown completed a psychiatric review technique form in August 1999,¹
13 noting Plaintiff would often have deficiencies of concentration,
14 persistence and pace and would experience once or twice episodes of
15 deterioration. (Tr. at 260.) Also completed was a Mental Residual
16 Functional Capacity Assessment noting limitations with and without
17 the use of drugs. (Tr. at 262.) In that form, Dr. Kester opined
18 Plaintiff would not be significantly limited in his ability to

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20 ¹A psychiatric review form is a special technique to assist the
21 ALJ in determining whether a mental condition is severe or meets the
22 Listings, findings made at steps two and three. 20 C.F.R. §
23 416.920a(d). If the condition is found to be severe, a more
24 detailed functional assessment form (the Mental Residual Functional
25 Capacity Assessment form) is completed to assist the ALJ with
26 findings at steps four and five. SSR 96-8p. Thus, a failure to
27 include limitations noted in the psychiatric review form at steps
28 four and five is not error. SSR 96-8p.

1 understand, remember and follow simple instructions. (Tr. at 262.)
 2 Other occupational limitations would flow from continued use of
 3 cannabis. (Tr. at 263-264.) The ALJ correctly included a
 4 limitation to simple, one to three step instructions. (Tr. at 31.)

5 The ALJ, in addressing the medical evidence with respect to
 6 physical limitations, stated the following reasons for rejecting the
 7 opinions of the treating and examining physicians:

8 The claimant's residual functional capacity is at a medium
 9 level of physical exertion with additional restrictions.
 10 This exertional limitation is based upon the physical
 11 residual functional capacity assessment performed in
 December 1999 by Dr. Staley. This medical consultant
 12 found that the claimant was able to lift and carry 50
 13 pounds occasionally and 25 pounds frequently.
 Additionally, the claimant was also declared to be capable
 of standing/walking for 6 hours during an 8-hour workday
 and sitting for 6 hours. Dr. Staley also concluded that
 the claimant did not have any postural, manipulative or
 environmental restrictions.

14 The June 1999 assessment by Mohammad Choudhry, M.D.,
 15 generally confirms this medium level of physical exertion.
 In this opinion, the claimant was found to be able to lift
 16 and carry 30 to 40 pounds. Additionally, he had no
 limitations in bending, stooping or crouching. Dr.
 17 Choudhry also concluded that the claimant was able to
 stand for 30 to 45 minutes each hour as well as sit for 45
 18 minutes each hour.

19 To the extent that these opinions are inconsistent, I
 accord more weight to that of Dr. Staley, who had access
 20 to more of the claimant's medical records.

21 The Administrative Law Judge also finds that the claimant
 22 has non-exertional restrictions in his residual functional
 23 capacity. At the hearing, the claimant alleged that his
 peripheral neuropathy had manifested itself not only in
 24 leg pain, but also the inability to perform any tasks
 involving fine motor dexterity or manipulation. Although
 the medical record emphasizes neurological complaints in
 25 the lower extremities, the Administrative Law Judge, by
 interpreting the claimant's [testimony] in a manner most
 favorable to him, finds that the claimant's "RFC" includes
 26 a proscription on prolonged or repetitive fine fingering.

27 (Tr. at 26, references to exhibits omitted.) There is no discussion

1 by the ALJ of limitations imposed by Plaintiff's back condition and
2 only an inferential rejection of the gross manipulative limitation
3 noted by Dr. Choudhry.

4 At step two of the sequential process, the ALJ must conclude
5 whether Plaintiff suffers from a "severe" impairment, one which has
6 more than a slight effect on the claimant's ability to work. To
7 satisfy step two's requirement of a severe impairment, the claimant
8 must prove the existence of a physical or mental impairment by
9 providing medical evidence consisting of signs, symptoms, and
10 laboratory findings; the claimant's own statement of symptoms alone
11 will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms
12 must be evaluated on the basis of a medically determinable
13 impairment which can be shown to be the cause of the symptoms. 20
14 C.F.R. § 416.929. Once medical evidence of an underlying impairment
15 has been shown, medical findings are not required to support the
16 alleged severity of pain. *Bunnell v. Sullivan*, 947 F.2d 341, 345
17 (9th Cir. 1991). However, an overly stringent application of the
18 severity requirement violates the statute by denying benefits to
19 claimants who do meet the statutory definition of disabled. *Corrao*
20 v. *Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). Thus, the
21 Commissioner has passed regulations which guide dismissal of claims
22 at step two. Those regulations state an impairment may be found to
23 be not severe only when evidence establishes a "slight abnormality"
24 on an individual's ability to work. *Yuckert v. Bowen*, 841 F.2d 303,
25 306 (9th Cir. 1988) (citing Social Security Ruling 85-28). The ALJ
26 must consider the combined effect of all of the claimant's
27 impairments on the ability to function, without regard to whether
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1 each alone was sufficiently severe. See 42 U.S.C. § 423(d)(2)(B)
2 (Supp. III 1991). The step two inquiry is a *de minimis* screening
3 device to dispose of groundless or frivolous claims. *Bowen v.*
4 *Yuckert*, 482 U.S. 137, 153-154.

5 On October 6, 1995, Plaintiff was involved in a motor vehicle
6 accident and suffered injury to his neck, shoulder, and upper back.
7 James T. Martin, D.C., following an examination, noted Plaintiff
8 would have permanent cervical and lumbar impairments of 10%,
9 resulting in chronic pain which would limit him in employment
10 abilities forcing him to leave the work force at an early age. (Tr.
11 at 150.) This opinion was not addressed by the ALJ.

12 In March and May 1997, Plaintiff underwent two surgeries for
13 testicular cancer and bilateral retropubic pelvic lymph node
14 dissection, followed by two sessions of chemotherapy ending in July
15 1997. (Tr. at 160, 232.) As a result of the chemotherapy, Plaintiff
16 suffered nausea, fatigue, and peripheral neuropathy. (Tr. at 160.)
17 In November 1997, there was no evidence of cancer reoccurrence.
18 (Tr. at 169.) In May 1998, Plaintiff was evaluated by Dr. Celestia
19 Higano at the University of Washington for low back pain and
20 fatigue. (Tr. at 195.) She diagnosed fatigue syndrome and
21 lymphopenia. (Tr. at 195.) These diagnoses were not addressed by
22 the ALJ.

23 In June 1999, Dr. Choudhry examined Plaintiff, who complained
24 of chronic fatigue, pain in his hands, feet, neck and low back,
25 abdomen, and right leg. (Tr. at 206.) Dr. Choudhry noted decreased
pinprick and temperature touch in a glove and stocking pattern
caused by neuropathy secondary to chemotherapy that would result in
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1 a limitation of gross and fine manipulation. (Tr. at 209.) An x-
2 ray demonstrated partial sacralization at L5 with resultant mild
3 spondylosis. (Tr. at 211.) At an examination in November 1999,
4 bilateral muscle wasting was noted in Plaintiff's hands. (Tr. at
5 268.)

6 The ALJ noted only that the opinion of the consulting physician
7 was persuasive because he "had access to more of the claimant's
8 medical records." This reason, by itself, is not sufficiently clear
9 and convincing to reject, at step two, the findings of the examining
10 and treating physicians as to the severity of Plaintiff's fatigue,
11 lumbar condition and limitations regarding gross manipulation.
12 Crediting these opinions as a matter of law to find the impairments
13 severe at step two, the question remains as to Plaintiff's residual
14 capacity in light of the limitations supported by the record.
15 Additionally, if found disabled, findings must be made whether
16 Plaintiff's undisputed regular use of marijuana materially
17 contributed to disability. Accordingly,

18 **IT IS ORDERED:**

19 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**) is
20 **GRANTED**; the captioned matter is **REMANDED** for additional proceedings
21 pursuant to sentence four of 42 U.S.C. § 405(g).

22 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 20**) is
23 **DENIED**.

24 3. Any application for attorney fees shall be filed by
25 separate motion.

26 4. The District Court Executive is directed to file this
27 Order and provide a copy to counsel for Plaintiff and Defendant.

1 Judgment shall be entered for Plaintiff and the file shall be
2 **CLOSED.**

3 DATED May 19, 2006.

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5 S/ CYNTHIA IMBROGNO
6 UNITED STATES MAGISTRATE JUDGE
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